

A Golden Wheel Credit Sdn Bhd v Dato' Siah Teong Din

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-596-12
OF 2020

B ONG CHEE KWAN JC
12 APRIL 2023

C *Moneylenders — Loan — Recovery of — Licensed moneylender filed action to recover loan premised on equitable principles of 'money had and received' and unjust enrichment — Moneylender did not base claim on moneylending agreements with borrower as the same was void and unenforceable under Moneylenders Act 1951 ('the MLA') for breach of various provisions of the MLA*
D *— Whether allowing moneylender to recover loan despite blatant breaches of MLA would stultify intention and policy behind the MLA, ie, to deter illegal moneylending activities — Whether moneylender could not rely upon ss 66 or 71 of Contracts Act 1950 to support its claim — Whether s 66 only applied if agreement became void or was discovered to be void and not where it was void ab initio — Whether s 71 would not apply to acts which were unlawful and expressly prohibited by statute*
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F In this action, the plaintiff, a licensed moneylender, sought to recover a principal sum of RM3,383,500 it had loaned the defendant but the action was not founded on the moneylending agreement between the parties but rather on the ground of 'money had and received' and/or the doctrine of unjust enrichment. This was because the plaintiff knew that its moneylending agreement with the defendant was void and unenforceable under the Moneylenders Act 1951 ('the MLA') because the loan transaction had flouted
G several material provisions of the MLA. The breaches included the imposition of 1.5% per month (or 18%pa) interest on the loan contrary to s 17A of the MLA, the deduction by the plaintiff of the sum of RM76,500 from the total loan amount to pay for 'transaction costs' contrary to s 23 of the MLA, the plaintiff's failure to provide the defendant with a stamped copy of the moneylending agreement as well as statements of account contrary to ss 16 and
H 19, respectively, of the MLA and the using of 'unsecured loan' forms to secure the transaction when the plaintiff knew that the loan was secured, contrary to s 10P of the MLA. The plaintiff's pleaded case was that it was unconscionable and unjust for the defendant to retain the monies it had borrowed from the plaintiff without repaying the same. The plaintiff argued that the public policy
I behind the MLA, namely, to deter illegal moneylending activities, would not be stultified if the plaintiff was allowed to claim the outstanding principal sum based on the equitable principles of unjust enrichment and money had and received.

Held, dismissing the plaintiff's action:

- (1) If the plaintiff was allowed to claim the loan sum, even if the same was confined only to the principal amount, it would mean that a moneylender was free to flout the strict requirements imposed under the MLA without any risks or with little adverse repercussions. This would clearly result in stultifying the intention and policy behind the MLA (see para 83).
- (2) The whole purpose of the MLA was to regulate the terms and conditions of the moneylending transaction between the parties such that unconscionable terms were not imposed by the moneylender on the borrower. In this regard, Parliament had by legislation determined what in its wisdom were unacceptable terms which would render a moneylending transaction void and unenforceable (see para 79).
- (3) In the instant case, a material provision of the MLA which the plaintiff had contravened was s 17 which stipulated that the interest for a secured loan (such as in the present case) shall not exceed 12%pa. Although the loan in the instant case was secured by a guarantee, the loan was treated as unsecured in order that a higher interest rate than permitted could be imposed. This was precisely the reason why Parliament provided in s 17(3) that a breach of this provision rendered the moneylending transaction void and unenforceable. Similarly, the wrongful deduction and retention by the plaintiff of the sum of RM76,500 was expressly prohibited and was a feature most commonly found in illegal moneylending transactions by loan sharks or 'Ah long'. The failure to provide stamped copies of the moneylending agreements and the statement of accounts were also serious breaches of the MLA (see paras 80–82).
- (4) The plaintiff could not rely upon s 66 and s 71 of the Contracts Act 1950 to support its claim. Section 66 would only apply in cases where the agreement became void or was discovered to be void and not where the moneylending transaction was *void ab initio* as in the present case. As for s 71, it would not apply to acts which were unlawful and expressly prohibited by statute. For these reasons, it was unnecessary for the court to consider whether the plaintiff had satisfied the pre-requisites for establishing a cause of action for unjust enrichment and/or for monies had and received (see paras 85–88).

[Bahasa Malaysia summary]

Dalam tindakan ini, plaintif, pemberi pinjaman wang berlesen, memohon untuk mendapatkan semula jumlah prinsipal sebanyak RM3,383,500 yang ia telah pinjamkan kepada defendan tetapi tindakan tersebut tidak diasaskan pada perjanjian pinjaman wang antara pihak-pihak sebaliknya atas alasan 'wang yang dipunyai dan diterima' dan/atau doktrin pengayaan yang tidak

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- A wajar. Ini kerana plaintif mengetahui bahawa perjanjian pinjaman wangnya dengan defendan adalah terbatal dan tidak boleh dikuatkuasakan di bawah Akta Pemberi Pinjam Wang 1951 ('APPW') kerana transaksi pinjaman tersebut telah melanggar beberapa peruntukan material APPW. Pelanggaran tersebut termasuk pengenaan faedah 1.5% sebulan (atau 18% setahun) ke atas pinjaman yang bertentangan dengan s 17A APPW, pemotongan oleh plaintif pada jumlah RM76,500 daripada jumlah pinjaman untuk membayar 'kos transaksi' bertentangan dengan s 23 APPW, kegagalan plaintif untuk menyediakan kepada defendan salinan setem perjanjian pinjaman wang serta penyata akaun bertentangan dengan ss 16 dan 19, APPW dan penggunaan borang 'pinjaman tidak bercagar' untuk menjamin transaksi apabila plaintif mengetahui bahawa pinjaman tersebut adalah pinjaman bercagar, bertentangan dengan s 10P APPW. Kes yang dihidang oleh plaintif adalah bahawa ianya adalah tidak wajar dan tidak adil bagi defendan untuk mengekalkan wang yang dipinjam daripada plaintif tanpa pembayaran balik. Plaintif berhujah bahawa dasar awam di sebalik APPW, iaitu, untuk menghalang aktiviti pinjaman wang haram, tidak akan terkesan jika plaintif dibenarkan menuntut jumlah prinsipal tertunggak berdasarkan prinsip saksama pengayaan yang tidak wajar dan wang yang dipunyai dan diterima.

E **Diputuskan**, menolak tindakan plaintif:

- (1) Jika plaintif dibenarkan untuk menuntut jumlah pinjaman, walaupun jumlah yang sama hanya terhad kepada amaun prinsipal, ia bermakna pemberi pinjaman wang bebas untuk melanggar syarat ketat yang dikenakan di bawah APPW tanpa sebarang risiko atau dengan sedikit kesan buruk. Ini jelas akan menyebabkan niat dan dasar di sebalik APPW terkesan (lihat perenggan 83).
- (2) Keseluruhan tujuan APPW adalah untuk mengawal selia terma dan syarat urus niaga pinjaman wang antara pihak supaya terma yang tidak wajar tidak dikenakan oleh pemberi pinjaman wang ke atas peminjam. Dalam hal ini, Parlimen telah melalui perundangan menentukan apa yang secara hikmahnya adalah syarat-syarat yang tidak boleh diterima yang akan menyebabkan transaksi pinjaman wang tidak sah dan tidak boleh dikuatkuasakan (lihat perenggan 79).
- (3) Dalam kes semasa, peruntukan material APPW yang telah dilanggar plaintif adalah s 17 yang menetapkan bahawa faedah untuk pinjaman bercagar (seperti dalam kes semasa) tidak boleh melebihi 12% setahun. Walaupun pinjaman dalam kes semasa telah dicagarkan dengan jaminan, pinjaman tersebut dianggap sebagai tidak bercagar supaya kadar faedah yang lebih tinggi daripada yang dibenarkan boleh dikenakan. Inilah sebabnya mengapa Parlimen memperuntukkan dalam s 17(3) bahawa pelanggaran peruntukan ini menyebabkan urus niaga pinjaman wang tidak sah dan tidak boleh dikuatkuasakan. Begitu juga, pemotongan dan

pengekalannya salah oleh plaintiff sejumlah RM76,500 adalah dilarang secara nyata dan merupakan ciri yang paling biasa ditemui dalam urusan niaga pinjaman wang haram oleh peminjam atau 'Ah long'. Kegagalan untuk memberikan salinan setem perjanjian pinjaman wang dan penyata akaun juga merupakan pelanggaran serius terhadap APPW (lihat perenggan 80–82).

- (4) Dalam kes semasa, peruntukan material APPW yang telah dilanggar plaintiff adalah s 17 yang menetapkan bahawa faedah untuk pinjaman bercagar (seperti dalam kes semasa) tidak boleh melebihi 12% setahun. Walaupun pinjaman dalam kes semasa telah dicagarkan dengan jaminan, pinjaman tersebut dianggap sebagai tidak bercagar supaya kadar faedah yang lebih tinggi daripada yang dibenarkan boleh dikenakan. Inilah sebabnya mengapa Parlimen memperuntukkan dalam s 17(3) bahawa pelanggaran peruntukan ini menyebabkan urusan niaga pinjaman wang tidak sah dan tidak boleh dikuatkuasakan. Begitu juga, pemotongan dan pengekalannya salah oleh plaintiff sejumlah RM76,500 adalah dilarang secara nyata dan merupakan ciri yang paling biasa ditemui dalam urusan niaga pinjaman wang haram oleh peminjam atau 'Ah long'. Kegagalan untuk memberikan salinan setem perjanjian pinjaman wang dan penyata akaun juga merupakan pelanggaran serius terhadap APPW (lihat perenggan 80–82).]

Cases referred to

- Amanah Raya Capital Sdn Bhd v Siti Zaharah bt Sulaiman* [2014] 11 MLJ 464, HC (distd)
- Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65, CA (refd)
- Dr HK Fong Brainbuilder Pte Ltd v SG-Maths Sdn Bhd & Ors* [2021] 1 MLJ 549, CA (refd)
- Holman v Johnson* [1775] 1 Cowp 341, KBD (refd)
- Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141, FC (refd)
- Mahmood bin Ooyub v Li Chee Loong and another appeal* [2020] 6 MLJ 755, CA (folld)
- Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141; [1996] 3 CLJ 494, CA (refd)
- Ochroid Trading Limited v Chua Siok Liu* [2018] 1 SLR 363, CA (refd)
- Orix Credit Malaysia Sdn Bhd v Choong Keong Kor* [2011] MLJU 182; [2011] 1 LNS 111, HC (distd)
- Pang Mun Chung & Anor v Cheong Huey Charn* [2018] 4 MLJ 594, CA (refd)
- ParkingEye Ltd v Somerfield Stores Ltd* [2013] 2 WLR 939, CA (refd)
- Patel v Mirza* [2016] UKSC 42, SC (refd)
- St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267, QBD (refd)
- Tinsley v Milligan* [1994] 1 AC 340, HL (not folld)
- Tribe v Tribe* [1996] Ch 107, CA (refd)

A Legislation referred to

Contracts Act 1950 ss 24, 24(a), (b), (e), 66, 71

Franchise Act 1998 ss 6, 6A

Moneylenders Act 1951 ss 10P, 16, 17, 17(3), 17A, 19, 23

B Moneylenders (Control and Licensing) Regulations 2003 Schedules J, K

Real Property Gains Tax Act 1976

Moneylenders Act 2008 [SG]

Stamp Act 1949 s 47

C *Alfred Lai Choong Wui (with Cheng Xin Yan) (Alfred Lai & Partners) for the plaintiff.*

Wai Cheng Khuan (with Derek Chin Tze Qi) (Low & Partners) for the defendant.

Ong Chee Kwan JC:**D INTRODUCTION**

[1] This is a judgment delivered after trial.

E [2] The plaintiff is a licensed moneylender.

[3] In this action, the plaintiff is seeking to recover the money lent out in the course of its business based on the doctrine of unjust enrichment instead of claiming in contract. This is because in carrying out the moneylending transactions in this case, the plaintiff had failed to comply and in fact had contravened certain material provisions of the Moneylenders Act 1951 which had the effect of rendering the moneylending transactions void and unenforceable. The main issue is whether a claim based on unjust enrichment or money had and received is permitted to get around the contraventions stipulated in the Moneylenders Act 1951.

G**BACKGROUND FACTS**

[4] The plaintiff is a licensed moneylender under the Moneylenders Act 1951 and has its registered address at D3A-M (Suite B), Jalan Selaman 1, Dataran Palma, Off Jalan Ampang, 68000 Ampang, Selangor Darul Ehsan and its business address at Suite 8.02, 8th Floor (North Block), The Ampwalk 218, Jalan Ampang, 50460 Kuala Lumpur, Wilayah Persekutuan.

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[5] At all material times, the defendant is and was a director and a shareholder of one Instant Bonus Development Sdn Bhd (Company No 988847-P) ('Instant Bonus').

[6] Sometime on 9 July 2018 and 24 August 2018, the plaintiff and the defendant entered into two moneylending agreements wherein the plaintiff agreed to provide loans of RM2m and RM1.5m respectively ('the moneylending agreements') to the defendant. A

[7] Contemporaneously with the moneylending agreements, the defendant also executed two letters of undertaking on 9 July 2018 and 24 August 2018 respectively relating to the aforesaid loans ('the letters of undertaking'). The terms of the letters of undertaking include as follows: B

(a) the defendant directing the plaintiff to disburse the loan sums under the moneylending agreements to Instant Bonus; C

(b) the defendant's guarantee and undertaking that the loan sums are deemed as received by the defendant and that the defendant is bound by the loan sums once the same are disbursed to Instant Bonus as instructed by the defendant; and D

(c) the defendant further guarantees and undertakes to be liable for all demands, losses and/or damages arising from the defendant's instruction. E

[8] There is no dispute that Instant Bonus had provided its guarantee for the defendant's payment obligations under the moneylending agreements. F

[9] Both the plaintiff and the defendant had agreed that a sum of RM76,500 would be deducted from the loan sums towards payment of the 'transaction costs' which was to be borne by the defendant. F

[10] Accordingly, and as agreed aforesaid, it is not in dispute that the plaintiff had disbursed a total sum of RM3,423,500 to Instant Bonus's Maybank account in the following tranches: G

(a) 11 July 2018: RM482,000;

(b) 24 July 2018: RM1,470,000; and

(c) 27 August 2018: RM1,471,500. H

[11] It is also not in dispute that the defendant had paid to the plaintiff a sum of RM40,000 as repayment for the loan sums, leaving a balance outstanding of RM3,383,500, not including the interest charged. I

[12] In this action, the plaintiff is seeking only the sum of RM3,383,500 from the defendant. The plaintiff's cause of action as pleaded is for money had and received and/or unjust enrichment and not based on the moneylending agreements.

A [13] It is the plaintiff's pleaded case that the defendant has been unjustly enriched by the loan sums which the defendant had received from the plaintiff. The plaintiff contends that it was never the intention for the defendant to retain the loan sums without the obligation to repay the same and that it is unjust and/or unconscionable for the defendant to continue to keep the loan sums without repaying the plaintiff.

C [14] The reason for the plaintiffs reliance on money had and received or unjust enrichment as its causes of action instead of its contractual rights under the moneylending agreements is understandable given that the plaintiff had acknowledged that the moneylending agreements had not complied with many of the mandatory provisions of the Moneylenders Act 1951 which means that the said agreements are void and unenforceable.

D [15] The plaintiff also does not dispute that it had previously brought a legal action against the defendant and Instant Bonus in the Kuala Lumpur High Court Suit No WA-22NCC-211-04 of 2019 ('Suit 211') for the recovery of the loan under the moneylending agreement dated 24 August 2018. Instant Bonus was sued in its capacity as guarantor for the said loan. However, on 29 May 2019, the plaintiff had discontinued Suit 211 against the defendant.

F [16] In the midst of the plaintiff's action against Instant Bonus in Suit 211, the company, Instant Bonus was wound up which had led to the plaintiff filing its proof of debt against the company for the sum of RM3.5m. This proof of debt has been admitted and disclosed in the company's statement of affairs filed with the Director General of Insolvency ('the DGI').

G [17] At the trial, the defendant testified that the loan sums were intended for Instant Bonus but the plaintiff had insisted for the defendant to execute the moneylending agreements instead and for Instant Bonus to act as guarantor for the loan sums.

H [18] The defendant claims that the moneylending agreements contravene the Moneylenders Act 1951 in many respects, in particular:

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- (a) notwithstanding that the loans were secured loans (ie guaranteed by Instant Bonus), the forms executed by the parties were forms under Schedule J of the Moneylenders (Control and Licensing) Regulations 2003 which are designed for unsecured loans. For secured loans, the proper and required forms ought to be the forms under Schedule K of the Moneylenders (Control and Licensing) Regulations 2003. This is in contravention of s 10P of the Moneylenders Act 1951;
 - (b) the interest charged under the moneylending agreements was 1.5% per month which is equivalent to 18%pa which contravenes s 17A of the

- Moneylenders Act 1951 that the interest rate chargeable on a secured loan shall not exceed 12%pa; A
- (c) the plaintiff had deducted and retained RM76,500 from the loan sums contrary to s 23 of the Moneylenders Act 1951;
- (d) the plaintiff also failed to provide the defendant with a stamped copy of the moneylending agreements which is a contravention of s 16 of the Moneylenders Act 1951; and B
- (e) the plaintiff had failed to provide the statement of account to the defendant as required under s 19 of the Moneylenders Act 1951. C
- [19] As regards the letters of undertaking, the defendant contended that the same are promissory notes and being unstamped, contravened s 47 of the Stamp Act 1949. D
- [20] Prior to the trial of this action, the defendant had applied to strike out the plaintiff's claim for money had and received and/or unjust enrichment on the ground that the plaintiff is in truth seeking to enforce an illegal contract and that this court should not lend any assistance to give effect to the same ('the striking out application'). E
- [21] This court had on 25 June 2021 allowed the striking out application. However, on 31 March 2022, the Court of Appeal allowed the plaintiff's appeal against the aforesaid decision. F
- [22] As a result, the trial of the plaintiffs claim proceeded on 20 December 2022.
- [23] One Miss Woo Pui Pheng ('PW1'), a director of the plaintiff testified on behalf of the plaintiff. The defendant himself gave evidence. Suffice it to state that the facts material to this action as adduced through PW1 and the defendant did not vary from the facts averred at the time of the striking out application. The material facts remained undisputed. G H
- [24] At the end of the trial, to my mind, there is only one legal issue for consideration the determination of which will dispose of the entire claim, namely, whether a licensed moneylender can recover the balance principal sum that was advanced under an illegal moneylending transaction based on a cause of action for unjust enrichment or money had and received. I

A THE COURT'S DELIBERATION

[25] Section 24 of the Contracts Act 1950 provides:

24 What considerations and objects are lawful, and what not

B The consideration or object of an agreement is lawful, unless:

- (a) It is forbidden by a law;
- (b) It is of such a nature that, if permitted it would defeat any law;
- (c) It is fraudulent;

- C (d) It involves or implies injury to the person or property of another; or
- (e) The court regards it as immoral, or opposed to public policy.

In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

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[26] Sections 66 and 71 of the Contracts Act 1950 in turn provide:

66 Obligation of person who has received advantage under void agreement, or contract that becomes void

E When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

71 Obligation of person enjoying benefit of non-gratuitous act

F Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

G [27] Prior to the decision by the UK Supreme Court in *Patel v Mirza* [2016] UKSC 42, the legal position in Malaysia in a case where a party to an illegal and unlawful contract seeks to enforce his rights thereunder is that such recovery based on an illegal contract is prohibited. This is based primarily on the principle enunciated by Mansfield CJ in *Holman v Johnson* [1775] 1 Cowp 341. In particular, at p 343, the learned Chief Justice held:

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The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the *plaintiffs own stating or otherwise, the cause of action appears to arise ex turpi causa*, or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the

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- defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis*. (Emphasis added.) A
- [28] The s 24(e) of our Contracts Act 1950 is in fact an adoption of the aforesaid common law principle. B
- [29] Subsequent cases further distinguished between contracts that are expressly or implicitly prohibited by statutes and those that merely contravene certain provisions of the statutes attracting appropriate penalties but are not prohibited by the provisions *per se*. In respect of such cases, the courts recognise that it would be unjust to apply the strict rule on refusing enforcement of the contracts and instead apply the doctrine of proportionality as a response to the illegality in each case (see the seminal judgment of Devlin J in *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267). C D
- [30] Even in cases where the contracts are void under common law, the courts would permit a party who is in *pari delicto* to make a claim as long as there is no need to rely on the illegal contract as the cause of action. This is the reliance principle which was applied by the English Court of Appeal in *Bowmakers Ltd v Barnet Instruments Ltd* [1945] KB 65 and the UK House of Lords decision in *Tinsley v Milligan* [1994] 1 AC 340. E
- [31] In *Tinsley v Milligan*, Miss Tinsley and Miss Milligan had jointly purchased a house which was registered in Miss Tinsley's name to facilitate a fraud by Miss Milligan to claim her housing benefits. When their relationship soured, Miss Milligan commenced an action to claim her interest in the house. Notwithstanding the illegality, the English House of Lords held that Miss Milligan could assert equitable ownership of the house. More specifically, Lord Browne-Wilkinson held at p 371, para F-H and p 3676, para G as follows: F G
- The presumption of a resulting trust is, in my view, crucial in considering the authorities. On that presumption (and on the contrary presumption of advancement) hinges the answer to the crucial question 'does the plaintiff claiming under the resulting trust have to rely on the underlying illegality?' Where the presumption of resulting trust applies, the plaintiff does not have to rely on the illegality. If he proves that the property is vested in the defendant alone but that the plaintiff provided part of the purchase money, or voluntarily transferred the property to the defendant, the plaintiff establishes his claim under a resulting trust unless either the contrary presumption of advancement displaces the presumption of resulting trust or the defendant leads evidence to rebut the presumption of resulting trust. Therefore, in cases where the presumption of advance does not apply, a plaintiff can establish his equitable interest in the property without relying in any way on the underlying illegal transaction ... (Emphasis added.); and* H I
- ... In my judgment the time has come to decide clearly that the rule is the same whether*

- A a plaintiff found himself on a legal or equitable title: he is entitled to recover of he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction.
- B As applied in the present case, that principle would operate as follows. *Miss Milligan established a resulting trust by showing that she had contributed to the purchase price of the house and that there was a common understanding between her and Miss Tinsley that they owned the house equally. She had no need to allege or prove why the house was conveyed into the name of Miss Tinsley alone, since that fact was irrelevant to her claim: it was enough to show that the house was in fact vested in Miss Tinsley alone. The illegality only emerged at all because Miss Tinsley sought to raise it. Having proved these facts, Miss Milligan had raised a presumption of resulting trust. There is no evidence to rebut that presumption. Therefore Miss Milligan should succeed.* (Emphasis added.)
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- D [32] Another exception to the strict rule against any recovery in the context of illegality is the principle of 'locus poenitentiae' which means 'the right to withdraw' or 'the time of repentance'. This refers to the act of repentance by a party who had entered into an unlawful contract. If the party in fact withdrew from carrying through with the illegal contract which remains executory, the doctrine will permit the party to recover money paid or goods transferred notwithstanding the illegality.

- E [33] The policy behind this rule appears to be that it discourages illegality by allowing parties to abandon illegal contracts. Thus, the claimant is allowed to withdraw from an illegal contract during 'the time for repentance' and recover benefits conferred even though the defendant is ready, willing and able to perform his or her side of the bargain. The precise boundaries of this doctrine are very unclear.
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- G [34] In *Tribe v Tribe* [1996] Ch 107, the English Court of Appeal held that where the presumption of advancement applies in a resulting trust, a plaintiff can rely on the illegality to rebut the presumption if the illegal purposes have not been carried into effect. In that case, Mr Tribe had worked all his life to establish and develop a prosperous business. Upon retirement, he planned to leave the business to his four children in equal parts. Unfortunately, two of his shops ran into some trouble with his landlord and he feared that they would go after his business. Hence, he transferred all his shares in the company to one of his sons on the agreed understanding that when the threat was lifted the son would reassign the shares to his father. Eventually, Mr Tribe came into a satisfactory arrangement with the landlord, thus eliminating his fears. He therefore asked the son to return the shares to him who refused to do so. Since the rebellious assignee was his son, a legal presumption arose according to which property transferred from a father to son is meant as a gift. In order to rebut this presumption, Tribe had to rely directly on the illegal nature of the transaction when giving evidence, and explain that he did not mean to make a gift but rather to cheat his creditors. Evidence of this kind was legally
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inadmissible, but the court helped the father to get his shares back by declaring that the son held the shares on a resulting trust for his father. The trial judge found that the transfer of the share to his son was made for an illegal purpose, namely to deceive Mr Tribe's creditors, but since the purpose had not been carried out into effect and no creditor is deceived by the transaction, the doctrine of *locus poenitentiae* applied and Mr Tribe was able to recover the shares.

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[35] The Court of Appeal unanimously upheld the trial judge's decision. Millet LJ stated at p 124, para E-F and p 133, para F-G as follows:

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It is, however, also settled both at law and in equity that a person who has transferred property for an illegal purpose can nevertheless recover his property provided that he withdraws from the transaction before the illegal purpose has been wholly or partly performed. This is the doctrine of the *locus poenitentiae* and it applies in equity as well as at law ...

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... The primary rule which precludes the court from lending its assistance to a man who founds his cause of action on an illegal or immoral act often leads to a denial of justice ... The doctrine of the *locus poenitentiae* is an exception which operates to mitigate the harshness of the primary rule. It enables the court to do justice between the parties even though, in order to do so, it must allow a plaintiff to give evidence of his own dishonest intent. *But he must have withdrawn from the transaction while his dishonesty still lay in intention only. The law draws a line once the intention has been wholly or partly carried into effect.* (Emphasis added.)

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[36] Further, in the decision of the English Court of Appeal in *ParkingEye Ltd v Somerfield Stores Ltd* [2013] 2 WLR 939, the defence of illegality was rejected when to uphold the same would lead to a disproportionate result. This led the English Court of Appeal into looking at policy considerations underpinning the illegality to assess the proportionate response to the illegality defence.

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[37] The aforesaid culminated in *Patel v Mirza* where the majority of the Law Lords of the UK Supreme Court decided in favour of a restitutionary award in response to an unjust enrichment despite the illegal transaction on which the enrichment was based on the premise of a *policy based approach* as opposed to the traditional *rule based approach* described above. In particular, the majority Law Lords led by Lord Toulson in the UK Supreme Court held that the rule that a party to an illegal agreement cannot enforce a claim against the other party to the agreement if he has to rely on his own illegal conduct in order to establish the claim is no longer an immutable one. Instead, the court should assess whether the public interest would be harmed by the enforcement of the illegal agreement and this requires the court to consider: (a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by the denial of the claim; (b) any other

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- A relevant public policy on which the denial of the claim may have an impact; and (c) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts ('the trio of considerations').
- B [38] The minority comprising Lord Mance, Lord Clarke and Lord Sumption although arrived at the same result as the majority nevertheless adopted the rule-based approach largely in line with the traditional framework that precludes any recovery under an illegal contract but with a more liberal view of the availability of restitutionary recovery.
- C [39] An excellent analysis of the differences in the reasoning of the nine Justices in *Patel v Mirza* can be found in the Singapore Court of Appeal case of *Ochroid Trading Limited v Chua Siok Liu* [2018] 1 SLR 363, delivered by
- D Andrew Phang Boon Leong JA. Another useful reference is the article 'The Illegality Defence after *Patel v Mirza*: A Step Forward?' by Justice Datuk Harmindar Singh Dhaliwal published in *The Journal of The Malaysian Judiciary*, July 2018 at p 29.
- E [40] In fact, the Singapore Court of Appeal has declined to follow the policy approach by the majority in *Patel v Mirza* on the grounds that the case:
- (a) creates 'an unprincipled distinction between the law applicable in the situation of statutory illegality from that of common law illegality';
- F (b) 'conflates unnecessarily the principle of illegality with the alternative restitutionary remedies that might possibly follow thereafter'; and
- (c) engenders greater uncertainty as it 'requires the courts to weigh incommensurable factors'.
- G [41] Unlike Singapore, our courts have adopted, applied or referred to *Patel v Mirza* on at least four occasions.
- H [42] In the Federal Court case of *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141, the Federal Court had to consider, inter alia, whether a sale and purchase of agreement was void being in contravention of the provisions of Stamp Act 1949 and the Real Property Gains Tax Act 1976. In coming to its conclusion that the contravention of the provisions of the two Acts did not render the agreement illegal, the Federal Court adopted the trio of considerations by Lord Toulson in *Patel v Mirza*. More specifically, at paras [117] and [118] His Lordship Hasan Lah ('FCJ') held:
- I [117] Having carefully considered the authorities cited by the parties, we are inclined to agree with the contention of learned counsel for the first defendant that

the second SPA is not void. We agree with the view that the courts should be slow in striking down commercial contracts on the ground of illegality. The compliance with the Stamp Act 1949 and the Real Property Gains Tax 1976 are not the prerequisite for the second SPA to be enforceable. There is no prohibition under the two Acts to preclude the first defendant from acquiring rights to the subject land. The Stamp Act 1949 provides a penalty for breach of its provisions. Similarly, under the Real Property Gains Tax Act 1976 there are penalties for breach of its provision. In addition, it is provided that tax due and payable may be recovered by the government by civil proceeding as a debt to the government. The object of the two Acts is to raise revenue. There is therefore no sufficient nexus such as would satisfy the test laid down in *Curragh Investment Ltd.* The first defendant's infringement of the two Acts therefore did not prevent it from suing on the contract which is legal.

[118] In addition, we find that the test laid down by Lord Toulson in *Patel* that is to say, the trio considerations, is a sensible one, which we should follow. Applying the test to the facts of this case, we find that it is an overkill for the first defendant to lose the subject land for the infringement of the two Acts which is punishable by a fine upon conviction.

[43] The Federal Court was dealing with illegality under s 24(b) of the Contracts Act 1950 and had arrived at the conclusion that the sale and purchase agreement though the same had contravened the Stamps Act 1949 and the Real Property Gains Tax Act 1976, nevertheless, was not void under said s 24(b) of the Contracts Act 1950.

[44] The next case is *Pang Mun Chung & Anor v Cheong Huey Charn* [2018] 4 MLJ 594 where the Court of Appeal was concerned with the application of the defence of illegality and public policy in relation to an action brought to enforce a trust. A sale and purchase agreement was entered into between the plaintiffs and the first defendant in respect of a property for the purpose of enabling the plaintiff to secure a loan from the bank to raise capital for his laundry business. No consideration was paid by the first defendant under the sale and purchase agreement and the repayment of the loan was undertaken by the plaintiffs for 15 years when the repayment stopped due to the plaintiff's financial constraints. Consequently, the bank auctioned the property which resulted in certain surplus funds held by the bank. The plaintiffs claimed that the surplus was to be held in trust for them. The first defendant in turn alleged at a late stage that the arrangement was a sham and therefore void under s 24(e) of the Contracts Act 1950, contending that the court should not aid the enforcement of an illegal contract.

[45] His Lordship Harmindar Singh Dhaliwal JCA (as he then was) made the following comments on the issue of illegality raised:

[26] ... In our assessment, if the issue of illegality was taken at a late stage, as it was in this case, then the issue of restitution, whether under s 66 of the Contracts Act,

A or as unjust enrichment, is an attendant consideration which cannot be divorced from the issue of illegality.

[28] Dealing now with the issue of illegality, we observe, at the outset, that the law in this regard can be segregated broadly into contracts that are illegal under statute (statutory illegality) or contracts which are illegal at common law. There is no suggestion in the present case of any statutory illegality. We need only concern ourselves with illegality at common law which must be grounded upon established heads of public policy as the case law suggests. This principle is also embodied in s 24(e) of the Contracts Act which provides that any agreement of which the consideration or object is immoral or opposed to public policy is void.

C [46] His Lordship then stated clearly at the following passages at para [72] and [73] of the judgment that the reliance principle as set out in *Tinsley v Milligan* is no longer to be followed in Malaysia and that the policy-based approach of the majority in *Patel v Mirza* is to be preferred over that of the minority:

D [72] We would therefore agree that in deciding whether to grant or refuse relief for contracts affected by illegality, the essential consideration is the public interest in the integrity (and consistency) of the legal system. In assessing whether enforcement of a claim would be harmful to the integrity of the legal system and therefore contrary to the public interest, it is necessary to consider the following: (a) the underlying purpose of the prohibition or reasons why the conduct was made illegal; (b) other relevant public policy which would be affected by a denial of the claim; and (c) whether denial of the claim would be a proportionate response to the illegality by considering factors such as seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was a marked disparity in the parties' respective culpability.

E [73] We would also agree that the reliance principle set out in *Tinsley v Milligan*, and the cases following it, should be rejected on account of the principle exemplifying the problems of arbitrariness, uncertainty and potential for injustice (see *Patel v Mirza*, Lord Toulson, para 24). In coming to this view, we have not overlooked the views of the minority in *Patel v Mirza* that the discretionary approach advocated by the majority was 'converting legal principle into an exercise of judicial discretion' leading to less clarity and certainty in the law (see Lord Sumption, *Patel v Mirza* at para 265 and Lord Neuberger at para 158). However, we are more persuaded that the approach recommended by the majority is the way forward as it brings an end to the fragmented state of the law. As observed by Lord Kerr in *Patel v Mirza* (at para 123), the courts are now spared from having to 'devise piecemeal and contrived exceptions to previous formulations of the illegality rule'. We also think that it is an approach which is consistent with upholding the integrity and harmony of the law by achieving an equitable result based on the facts in each case.

I [47] On the facts of that case and applying the trios of considerations stated in *Patel v Mirza*, the Court of Appeal rejected the illegality defence stated at para [83] as follows:

- [83] In the present case, we take the view that the public policy of denying the first defendant an unjust windfall must take precedence over whatever policy advanced in favour of applying the illegality defence. In this connection, we are reminded of the oft-quoted passage in *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267 of Devlin J as follows (at p 288): Although the public policy in discouraging unlawful acts and refusing them judicial approval is important, it is not the only relevant policy consideration. There is also the consideration of preventing injustice and the enrichment of one party at the expense of the other. A B
- [48] To be clear, *Pang Mun Chung & Anor v Cheong Huey Charn* was not a case involving statutory illegality but common law illegality. C
- [49] Lord Toulson himself acknowledged that the policy-based approach that he propounded apply only to common law illegality when he said at para [110] of the judgment thus: D
- [110] The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted. E
- [50] The reason for the distinction is that the court cannot legislate and is therefore bound by statute. This is why the majority in *Patel v Mirza* acknowledged that the court must obviously abide by the terms of any statute. If a particular provision of a statute prohibits (whether expressly or by implication) a contract, then the court cannot (in the absence of legislative provision) proceed to consider a range of factors in order to decide on a discretionary basis whether it would permit recovery by one of the contracting parties under the illegal contract. F G
- [51] Next, we have the Court of Appeal case of *Mahmood bin Ooyub v Li Chee Loong and another appeal* [2020] 6 MLJ 755. In this case, the Court of Appeal had heard three appeals together involving moneylending transactions that were disguised as sale and purchase of properties. H
- [52] Lee Swee Seng JCA held that the device of using a sale and purchase agreement and a memorandum of transfer to secure the grant of a loan with interest to circumvent the provisions of the MLA was clearly void both under that Act as well as s 24 of the Contracts Act 1950. I

- A [53] His Lordship then address the question which is most relevant to our present case, namely, whether the court should order restitution of the balance principal sum not repaid in response to the claim that there would be unjust enrichment if the illegality defence is sustained.
- B [54] In rejecting the claim for unjust enrichment, the learned judge held at paras [259] to [262] as follow:
- C [259] In the Singapore Court of Appeal's case of *Ochroid Trading Limited & Anor v Chua Siok Liu (trading as Vie Import & Export) & Anor* [2018] SGCA 5 where a specially convened panel of five Judges of Appeal sat to deliberate on this same issue in the light of *Patel v Mirza* [2017] AC 467 watershed decision by the UK Supreme Court on illegality and restitution, the lender there had pleaded in the alternative a repayment of the balance principal sum not paid and the Court of Appeal had dismissed that, affirming the decision of the High Court that the joint venture investment agreement was null and void and unenforceable under the Singapore Moneylenders Act.
- D [260] At any rate we have given careful consideration to this plea though not pleaded in the statement of claim of the lenders and we are of the view that to allow restitution would be to allow the lenders to mock the law prohibiting illegal moneylending under the Moneylenders Act 1951.
- E [261] It would embolden the illegal moneylenders or 'alongs' as they are pejoratively stigmatised, giving them a gush of wind beneath their wings that they may fly higher with their new fangled and fraudulent schemes structured to look regular and respectable.
- F [262] We can almost hear them rejoicing with glee with the refrain, 'catch me if you can' and 'even if you can I'll still get back the balance principal loan!' It would be to give the alongs the best of both worlds and the public policy as reflected in the ever increasing fines and penalties and the greater powers given to the police to investigate and collect evidence would be stymied and stultified in the Moneylenders (Amendment) Act 2003 and the Moneylenders (Amendment) Act 2011.
- G [55] When referring to *Patel v Mirza*, Lee Swee Seng JCA held thus:
- H [263] The majority in *Patel's* case had propounded a 'range of factors' test as a defence to a claim in unjust enrichment. The minority seemed to suggest that restitution should always be available and that one should leave it to the criminal law to take care of the criminality aspect of the legislation. Our task is made easier by the clear words of s 15 of the Moneylenders Act 1951 which reads:
- I 15 *Contract by unlicensed moneylender unenforceable*
No moneylending agreement in respect of money lent after the coming into force of this Act by an *unlicensed moneylender shall be enforceable.* (Emphasis added.)

[56] The Court of Appeal was clearly dealing with a case of statutory illegality ie the moneylending agreements were entered into by an unlicensed moneylender which had rendered the contract unenforceable. Thus, the application of the trios of consideration in *Patel v Mirza* was not engaged.

A

[57] Lee Swee Seng JCA then considered whether the claim for restitution can be made under s 66 of the Contracts Act 1950 as an alternative to a claim under the illegal moneylending contracts. On this, the learned judge was emphatic in the rejection of the same:

B

[264] Additionally any claim for restitution must also satisfy the requirement of s 66 of the Contracts Act 1950 which provides as follows:

C

Obligation of person who has received advantage under void agreement, or contract that becomes void 66. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

D

[265] Here is a case where the lenders had carried out their illegal act to the end in the *Tan Bock Eng's* appeal and *Pushpavalli's* appeal where the property had been registered in the name of the lender or his nominee. It is not a case where the unlicensed moneylender was not aware of the illegality for otherwise he would not be engaged in such a convoluted transaction simmering beneath the thin veneer of respectability. It is a case where the agreements were *void ab initio* and not one where they become void subsequently or are discovered to be void. Section 66 of the Contracts Act 1950 is not available to illegal moneylenders or their nominees in *Li Chee Loong* and *Lim Len Tat* here in these appeals.

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[266] It is not for nothing that the whole agreement is made unenforceable. The House of Lords in UK in *Boissevain v Weil* [1950] AC 327 had introduced the stultifying principle where to allow a claim in restitution upon a finding of illegality would be to indirectly allow an enforcement of an illegal loan, albeit severing the illegal interest element from the principal. Lord Radcliffe issued his disapproval at p 341 as follows:

G

[I] This claim based on unjust enrichment were a valid one, the court would be enforcing on the respondent just the exchange and just the liability, without her promise, which the defence regulation has said that she is not to undertake by her promise. *A court that extended a remedy in such circumstances would merit rather to be blamed for stultifying the law than to be applauded for extending it.* (Emphasis added.)

H

[267] *Boissevain* case was a claim based on a total failure of consideration for the recovery of a loan which had been made in violation of exchange control regulations under the Defences (Finance) Regulations 1939 (UK). The House of Lords was clear that to allow the claim would be to allow an indirect enforcement of an illegal loan.

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[268] *Indeed to allow even the lenders to claim the principal would be to stultify the public policy behind the Moneylenders Act 1951. It would be to negate all the efforts put*

A *in place by Parliament to try to contain the menace of illegal moneylending with its horror stories of being stripped bare to one's tunic.*

[269] It is too late in the day to separate the good from the bad; it is a case where a 'little leaven leavens the whole lump' and that a contaminated fountain cannot pour forth both clear and brackish water. If the source is contaminated the spring and stream would be contaminated as well.

[58] The principle of stultification is aptly explained by Andrew Phang JCA at para [148] in *Ochroid Trading Limited v Chua Siok Liu* as follows:

C [148] In our judgment, the principle of stultification is both logical as well as common sensical. Whether a claim in unjust enrichment ought to be allowed notwithstanding the illegality of the underlying contract has to be determined by reference to the reason why the contract is prohibited. The concept of stultification is premised on this intuitive insight and furnishes a principled basis upon which to ascertain when, in a situation where there would otherwise be a valid claim in unjust enrichment, the court should nevertheless not allow the claim on the basis of illegality. The court should not allow the claim if to do so would undermine the fundamental policy, be it statutory or of the common law, that rendered the contract in question void and unenforceable in the first place. As Prof Birks perceptively points out, to allow the claim in such a situation would be to make a mockery or nonsense of the law that rendered the contract void and unenforceable to begin with. We would hasten to add that we have added the word 'fundamental' because there could conceivably be situations where to permit recovery pursuant to a claim in unjust enrichment might appear to the court to undermine some other policy, which policy, however, was not central to the prohibition of the contract concerned. Much will therefore depend on the precise policy considerations as construed in their context.

G [59] The most recent case to apply *Patel v Mirza* is another Court of Appeal case, a judgment delivered by Her Ladyship Lau Bee Lan JCA in *Dr HK Fong Brainbuilder Pte Ltd v SG-Maths Sdn Bhd & Ors* [2021] 1 MLJ 549. This is a case dealing with a master licensing agreement which had contravened ss 6 and 6A of the Franchise Act 1998 which provides:

6 Registration of franchisor

- H (1) A franchisor shall register his franchise with the Registrar before he can operate a franchise business or make an offer to sell the franchise to any person.
- (2) Any franchisor who fails to comply with this section, unless exempted by the Minister under section 58, commits an offence and shall, on conviction, be liable —
- I (a) If such person is a body corporate, to a fine not exceeding two hundred and fifty thousand ringgit, and for a second or subsequent offence, to a fine not exceeding five hundred thousand ringgit;

6A Registration of franchisee of foreign franchisor

- (1) Before commencing the franchise business, a franchisee who has been granted a franchise from a foreign franchisor shall apply to register the franchise with the Registrar by using the prescribed application form and such application shall be subject to the Registrar's approval.

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[60] Her Ladyship Lau Bee Lan JCA had agreed with the holding by the learned High Court judge that the non-registration of the master licensing agreement has the effect of rendering the agreement void and unenforceable under s 24(a) and (b) of the Contracts Act 1950.

B

[61] Her Ladyship then proceeded to consider the question whether unjust enrichment can be claimed by the party to an illegal contract and in this regard, she had alluded to the trios of considerations propounded by Lord Toulson in *Patel v Mirza* and the proportionality test submitted by the learned counsel for the plaintiff.

C

D

[62] In the end, however, Her Ladyship rejected those considerations and based her judgment on the fact that the breaches by the plaintiff of the ss 6 and 6A of the Franchise Act 1998 had rendered the same void and unenforceable. Hence, this was a case that involved a statutory illegality as opposed to common law illegality. Her Ladyship in fact made this clear at para [57]:

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On this score the case of *Pang Mun Chung* can be distinguished as the said case concerns with illegality at common law premised on established heads of public policy and s 24(e) of the CA 1950 whilst the appeal before us concerns with contracts that are illegal under statute (statutory illegality) as alluded in para 34 above.

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[63] Her Ladyship also rejected the plaintiffs claim under s 66 of the Contracts Act 1950 and agreed with the learned High Court judge's finding that:

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As such, the first defendant has not received any advantage under the MLA (2013) to be restored to the plaintiff under s 66 of the CA. Moreover, the plaintiff has taken the position in this case that MLA (2013) is valid and has not breached FA. Hence, the plaintiff did not plead in the SOC and adduce any evidence regarding any advantage received by the first defendant under a void MLA(2013).

H

(See para [63] of the judgment).

[64] Thus, from the aforesaid four cases, the current law on illegal contracts in Malaysia for the purpose of the present case can be summarised in this manner:

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- (a) the policy-based approach led by Lord Toulson in *Patel v Mirza* has been accepted as the preferred approach when dealing with illegality in common law. This includes both contracts that are prohibited by

- A common law illegality as well as contracts that are not strictly prohibited but the conduct and/or purpose of the contract renders the same illegal (eg contract entered with the object of committing an illegal act);
- (b) the reliance principle in *Tinsley v Milligan* is no longer to be followed;
- B (c) the policy-based approach is not brought into play in cases involving statutory illegality, this is implicit in *Dr HK Fong Brainbuilder Pte Ltd v SG-Maths Sdn Bhd & Ors* and *Mahmood bin Ooyub v Li Chee Loong and another appeal*;
- C (d) where a contract is *void ab initio*, s 66 of the Contracts Act 1950 has no application; and
- (e) the principle of stultification applies in the case where a claim is made for restitution for the recovery of the principal sum lent by the moneylender as to allow even the lender to claim the principal would be to stultify the public policy behind the Moneylenders Act 1951.
- D

[65] Learned counsel for the plaintiff contended that there will be no stultification of the public policy behind the Moneylenders Act 1951 if this court were to allow the plaintiff's claim based on unjust enrichment in this case.

[66] Learned counsel for the plaintiff referred to the two-stage inquiry for the stultification test referred to in *Ochroid Trading Limited v Chua Siok Liu* that is applicable to the present case:

- F Stage 1: Whether there is non-compliance of Moneylenders Act 1951 which could render the moneylending agreements void and unenforceable?
- G Stage 2: If the answer to the Stage 1 Inquiry above is in the positive, whether by allowing restitution to the plaintiff would stultify the public policy behind the Moneylenders Act 1951?

[67] Learned counsel for the plaintiff concedes that there are non-compliance of the provisions of the Moneylenders Act 1951 between the plaintiff and the defendant which renders the moneylending agreements void and unenforceable. Hence, the answer to the Stage 1 inquiry is in the positive.

[68] However, learned counsel for the plaintiff maintains that the public policy behind the Moneylenders Act 1951 will not be stultified if the plaintiff is permitted to claim the outstanding principal sum based on unjust enrichment or for money had and received.

[69] In this regard, learned counsel for the plaintiff contends that the public policy behind our Moneylenders Act 1951 is not much of a difference with the

Singaporean Moneylenders Act (Cap 188, 1985 Rev Ed), that is, to deter illegal moneylending activities (loan shark activities) which is a serious social menace to the Malaysian society.

A

[70] At all material times, the plaintiff is a licensed moneylender. The unpaid principal due and owing and payable by the defendant to the plaintiff in this case arose from bona fide moneylending pursuant to the moneylending agreements, the letters of undertaking and the three tranches of money (inclusive of the unpaid principal) have nothing to do with loan shark activities.

B

C

[71] Further, the moneylending agreements, the letters of undertaking and the three tranches of money (inclusive of the unpaid principal) do not contain any unlawful purpose to achieve any unlawful end and they also do not contain elements of cheating, deception or perpetrated to mislead. In fact, no such allegations are found in the pleadings.

D

[72] Based on the foregoing, learned counsel for the plaintiff contends that in allowing the plaintiffs claim for restitution limiting only to the unpaid principal sum in the present action, allowing the claim based on the equitable principles of money had and received and/or unjust enrichment would not stultify the public policy behind the Moneylenders Act 1951 at all. The amount claimed constitutes a sum actually advanced to the defendant and rightly due and payable by the defendant to the plaintiff.

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[73] Furthermore, learned counsel for the plaintiff argues that the use of Form J was a genuine mistake as PW1 had wrongly proceeded on the wrong assumption that a guarantee is not a security for the loans. There is therefore no unconscionable conduct on the part of the plaintiff.

G

[74] Learned counsel for the plaintiff refers to the case of *Amanah Raya Capital Sdn Bhd v Siti Zaharah bt Sulaiman* [2014] 11 MLJ 464 where the learned judge, Nallini Pathmanathan J (now justice of the Federal Court) had held that the plaintiff in that case ought not to be deprived of recovering monies lent to the defendant simply because it had utilised a wrong form.

H

[75] With respect, the facts in *Amanah Raya Capital Sdn Bhd* are very different from the case before this court. There was no overcharging of interest or the failure to provide the defendant with a stamped copy of the moneylending agreement or statement of account in contravention of ss 16 and 19 of the Moneylenders Act 1951 as in this case. The learned judge held that 'the plaintiff here has in fact complied in spirit and principle with the Act and Regulations ...'. This cannot be said of the plaintiff in the present case. In any case, the learned judge also held that *Amanah Raya Capital Sdn Bhd* was

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A exempted from complying with the provisions of the Moneylenders Act 1951 on the terms and conditions set out in PU(B) 35/2009.

B [76] Reliance was also made to the case of *Orix Credit Malaysia Sdn Bhd v Choong Keong Kor* [2011] MLJU 182; [2011] 1 LNS 111 where the High Court held that non-compliance of Moneylenders Act 1951 does not preclude a licensed moneylender from founding an action based on other principles of law. In particular, paras 25–26, pp 52–53 and paras 30–31, p 54 of the judgment stated thus:

C [25] Be that as it may, *from my observation of Act 400, there is no provision anywhere in this legislation that an action for recovery of any loans by a licensed moneylender must necessarily be brought under Act 400; or that the plaintiff cannot recover its money lent under any other principle of law.* Even if Act 400 is one which allows for contracting out of its operation, which it is not; *it is also my judgment that maintaining a claim for money had and received cannot and does not mean that there is an attempt to contract out of its application.*

D [26] *If there was any non-compliance with any provision of Act 400, and I have not been shown any; it would only mean that the plaintiff is unable to rely on the provisions of Act 400 or enforce the agreement under Act 400. It does not mean that the plaintiff is barred from founding an action based on any other principle of law or right afforded under any other legislation or common law.* This was the case in *Burton v Companies Registration Agency* 23 TLR 337 where the claim was allowed despite the bill of sale being found to be void under s 12 of the Bills of Sale Act 1882. The court held that a void bill merely meant that the claimant was not entitled to recover the money advanced on a higher rate of interest. The claimant was not deprived of the right to recover the money with proper interest.

F [30] While the Federal Court in *Ponnuthurai v Nasib Singh* did not address the issue under Act 400, I am nevertheless convinced that the reasoning is the same. *Especially since there is nothing prohibitory in Act 400 about maintaining an action outside Act 400; or that an action by licensed moneylenders must only be made within the confines of Act 400. There is clear evidence that the defendant had received a sum of money from the plaintiff to which he had promised to pay or repay in full. He has not repaid in full. In the absence of any valid ground afforded under the law, the defendant is obliged to make good the money that he had received from the plaintiff. There is also no evidence of any intention on the part of the plaintiff that the defendant is allowed to keep the money which he had borrowed from the plaintiff if the plaintiff is unable or decides to not pursue a claim under Act 400.* In fact, the defendant is not even making that suggestion. *Most importantly, there is 'nothing unlawful about the lending of money in connection with which it was given' here. The loan was for a project which the defendant testified had subsequently failed.* Hence, the arguments of the defendant in this regard are without merit and must be dismissed.

H [31] For all the reasons set out, I am amply satisfied on a balance of probabilities that the plaintiff's claim has been proved. *As the plaintiff is no longer relying on the terms of the agreement, I hereby order the defendant to repay the plaintiff the sum of RM870,119 together with interest at the rate of 8% from the date of judgment to the date of realisation.* I also order the defendant to pay the plaintiff costs of RM20,000.

- This sum was proposed by both counsel and I agree that this is an appropriate and reasonable sum having regard to the total circumstances of this case. A
- [77] Thus, in *Orix Credit Malaysia Sdn Bhd v Choong Keong Kor*, Justice Mary Lim Thiam Suan (now a Justice of the Federal Court) ruled that the licensed moneylender is able to recover restitution based on the equitable principle of money had and received and other principles of law or right afforded under any other legislation or common law, even if there is non-compliance of the Moneylenders Act 1951 in the moneylending agreement, when there is nothing unlawful about the lending of money in connection with which it was given. B C
- [78] I accept that where a contract is unenforceable for illegality, whether by statute or at common law, benefits transferred might be recovered through a restitutionary claim if by permitting the same, it would not lead to stultifying the fundamental policy underlying the prohibition. For example, there is no doubt that title to the property can pass under an illegal contract (see *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141; [1996] 3 CLJ 494 (CA)) and in appropriate cases, eg where parties are not in *pari delicto*, the court may still order the recovery of the property so passed. D E
- [79] However, I am in agreement with the judgment of Lee Swee Seng JCA in *Mahmood bin Ooyub v Li Chee Loong and another appeal* which in any case is a judgment of the Court of Appeal for which I am bound. The whole purpose of the Moneylenders Act 1951 is to regulate the terms and conditions of the moneylending transaction between the parties such that unconscionable terms are not imposed by the moneylender on the borrower. In this regard, Parliament has by legislation determined what in its wisdom are deemed as unacceptable terms rendering any moneylending transaction to be void and unenforceable. F G
- [80] In the instant case, one of the material provisions of the Moneylenders Act 1951 that the plaintiff has contravened is s 17 which stipulates that the interest for a secured loan shall not exceed 12%pa. The contravention of this provision is a serious matter and s 17(3) expressly provides that the consequence of any non-compliance will result in the moneylending transaction being void and unenforceable. H
- [81] I am unable to accept PW1's testimony that she had made an 'honest mistake' in treating the loans as unsecured despite the existence of the guarantee. The plaintiff has been carrying on moneylending business since 1976, for more than 40 years. All the loan documentations were prepared by the plaintiff's solicitors. It is simply disingenuous to plea ignorance in the circumstances. On the contrary, to seek to impose a higher interest rate than I

A permitted by treating the loans as unsecured when the case is otherwise is precisely why Parliament provides for such loans to be void and unenforceable.

B [82] Similarly, the wrongful deduction and retention of the loan sums is expressly prohibited and is in fact a feature most commonly found in illegal moneylending by loan sharks or 'Along'. The failure to provide stamped copies of the moneylending agreements and the statement of accounts are also serious breaches.

C [83] Accordingly, if the plaintiff were to be permitted to claim the loan sum even if the same is confined only to the principal sum, it will mean that a moneylender is free to flout the strict requirements imposed under the Moneylenders Act 1951 without any risks or with little adverse repercussions. This will clearly result in stultifying the intention and policy behind the Moneylenders Act 1951.

D [84] As regards *Orix Credit Malaysia Sdn Bhd v Choong Keong Kor*, the case can be distinguished on its facts as there was no evidence of any contravention of the provisions of the Moneylenders Act 1951 by the lender in that case.

E [85] The plaintiff has also relied on ss 66 and 71 of the Contracts Act 1950 to support its claim.

F [86] As alluded to above, s 66 of the Contracts Act 1951 was dealt with by Lee Swee Seng JCA in *Mahmood bin Ooyub v Li Chee Loong and another appeal*. The said section is applicable only in cases where the agreement becomes void or is discovered to be void and has no relevance where the moneylending agreement is *void ab initio* as in the present case.

G [87] As regards s 71, it is my judgment that this section does not apply to acts which are unlawful and expressly prohibited by statute. If the plaintiff is permitted to recover the unpaid principal sum under the illegal moneylending agreements, this will also effectively stultify the policy under the Moneylenders Act 1951.

H [88] By reason of the aforesaid, it is unnecessary for this court to consider if the plaintiff has satisfied the prerequisites for establishing a cause of action for unjust enrichment and/or for money had and received given my conclusions above.

I
CONCLUSION

[89] Accordingly, for the reasons stated above, the plaintiffs action is dismissed with costs fixed at RM25,000 subject to allocator.

Plaintiff's action dismissed.

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Reported by Ashok Kumar

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